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IN THE

Supreme Court of the United States

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.; KNIGHT CAPITAL AMERICAS L.P., FORMERLY KNOWN AS KNIGHT EQUITY MARKETS L.P.; UBS SECURITIES LLC; E*TRADE CAPITAL MARKETS LLC; NATIONAL FINANCIAL SERVICES LLC; AND CITADEL DERIVATIVES GROUP LLC,
Petitioners,

v.

GREG MANNING; CLAES ARNRUP; POSILJONEN AB; POSILJONEN AS; SVEABORG HANDEL AS; FLYGEXPO AB; AND LONDRINA HOLDING LTD.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY BRIEF FOR PETITIONER

The brief in opposition confirms the case for certiorari. Respondents expressly acknowledge a conflict in the circuits on the question presented: whether § 27 of the Securities Exchange Act of 1934 provides federal jurisdiction over state-law claims seeking to establish a violation of the Act or its regulations or to enforce duties created by the Act or its regulations. Respondents nevertheless urge denial of review primarily because, they say, the Third Circuit held that their claims do not do so. But the Third Circuit held unambiguously that respondents "assert in their Amended Complaint, both expressly and by implication, that Defendants repeatedly violated federal law"—specifically, Regulation SHO, an SEC regulation promulgated under the Exchange Act. Pet. App. 9a. Contrary to respondents' suggestion, the existence of those allegations is not in doubt—the only question is whether they suffice to establish federal jurisdiction under § 27.

What respondents present as a "vehicle" objection to certiorari thus turns out to be a misplaced merits argument about the question presented. In the passages respondents cite, the Third Circuit was explaining that the state-law claims in the complaint do not *necessarily* require proof of a federal securities-law violation, which matters for *federal-question* jurisdiction under 28 U.S.C. § 1331. Respondents misunderstand that conclusion to foreclose the possibility that the claims could be subject to federal jurisdiction under § 27. But that is the question presented: whether § 27 provides jurisdiction over a state-law claim seeking to establish a federal securi-

ties-law violation or enforce a federal securities-law duty, even if § 1331 does not do so. Respondents and the Third Circuit erroneously believe that § 27 is triggered only when the state-law claim necessarily requires proof of the securities-law violation, i.e., when there is already federal jurisdiction under § 1331. That view conflates jurisdiction under § 27 with jurisdiction under § 1331, despite crucial differences in language and structure, which neither respondents nor the Third Circuit can explain.

But what matters for present purposes is that the Third Circuit explicitly recognized that respondents' state-law claims allege a violation of Regulation SHO and seek to enforce duties thereunder, meaning that they come within the plain terms of § 27. The merits question is whether § 27 means what it says and provides jurisdiction over such claims. The answer is yes. Certiorari should be granted.

A. No "Antecedent Fact Question" Prevents This Court From Answering The Question Presented In This Case

This case provides an excellent vehicle to resolve the circuit conflict about whether § 27 is an independent basis for federal jurisdiction. Respondents' "vehicle" argument rests on a fundamental misunderstanding of the decision below. As respondents note, the Third Circuit observed that "'Regulation SHO is not an element of any of Plaintiffs' claims'" and that none of the claims in the amended complaint "'are predicated at all on a violation of Regulation SHO.'" Opp. 15 (emphasis removed) (quoting Pet. App. 13a, 14a). Respondents contend that those statements demonstrate that the Third Circuit found

that their claims do not assert violations of the Exchange Act or its regulations or seek to enforce duties created by the Act or its regulations (and therefore do not fall within § 27).

Respondents are wrong. The Third Circuit explicitly concluded that "[t]here is no question that Plaintiffs assert in their Amended Complaint, both expressly and by implication, that Defendants repeatedly violated federal law," i.e., Regulation SHO, the only federal law identified in the complaint. Pet. App. 9a. The court recognized that respondents' complaint "repeatedly mentions the requirements of Regulation SHO, its background, and enforcement actions taken against some [petitioners] regarding Regulation SHO," "cites data maintained to assist broker-dealers in complying with Regulation SHO's close out requirement, and at times couches its allegations in language that appears borrowed from Regulation SHO." *Id.* at 8a-9a.

In the statements cited by respondents, the court was analyzing jurisdiction under *§ 1331* (*see* Pet. App. 13a-15a), which *does* turn on whether the federal question is "*necessarily* raised" in the state-law claim. *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfr'g*, 545 U.S. 308, 314 (2005) (emphasis added). The Third Circuit held that respondents' state-law claims, while invoking Regulation SHO, do not necessarily raise a federal question, because a state court could possibly find their claims meritorious without relying on Regulation SHO. *See* Pet. App. 13a-15a. That is why the Third Circuit stated that respondents' claims are not "predicated" on Regulation SHO. *See id.* at 14a.

The question presented here, however, is whether § 27 is different than § 1331, so the court's analysis under § 1331 does not resolve the § 27 inquiry. Thus, while it might not have been *necessary* for respondents to assert a violation of Regulation SHO and the duties it imposes when bringing their state-law claims, they *chose* to do so. And § 27 reflects a congressional determination that federal courts, rather than state courts, must adjudicate such claims. Respondents' "vehicle" argument simply misunderstands the question before the Court, assuming that § 27 is no different than § 1331 when the Court has been asked to decide whether that is so.

B. There Is A Direct Circuit Conflict

The Third Circuit below expressly "disagree[d]" with the decisions of the Fifth and Ninth Circuits holding that "there can be jurisdiction under § 27 (and other exclusive jurisdiction provisions) even when there is not under § 1331," Pet. App. 20a; *see id.* at 20a n.9, and instead "agree[d]" with the Second Circuit's holding "that § 27 is coextensive with § 1331 for purposes of establishing subject-matter jurisdiction," *id.* at 22a.[1] The Second Circuit has also "recently acknowledged this split." *Id.* at 19a; *see NASDAQ OMX Grp., Inc. v. UBS Secs., LLC*, 770 F.3d 1010, 1030 (2d Cir. 2014). In short, the Second and Third Circuits hold that § 27 does not provide

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[1] Respondents dispute (Opp. 23-24) petitioners' suggestion that the Second Circuit might not "follow the approach adopted in *Barbara* if it considered the issue anew today." Pet. 17 n.3. That debate is irrelevant, as all agree that *Barbara* remains controlling in the Second Circuit. *See* Pet. 17 n.3; Opp. 23.

federal jurisdiction where there is not already jurisdiction under § 1331. The Fifth and Ninth Circuits disagree, holding that § 27 *itself* creates federal jurisdiction, regardless whether § 1331 applies.

Respondents do not deny the circuit conflict, but seek to minimize it, proposing that it is somehow "far from clear" that the Fifth and Ninth Circuits have held that § 27 creates federal jurisdiction independent of § 1331. Opp. 24. In the next breath, however, respondents concede that in *Hawkins v. National Association of Securities Dealers, Inc.*, 149 F.3d 330 (5th Cir. 1998), the Fifth Circuit "did hold 'that § 27 provided federal jurisdiction without conducting any analysis under § 1331.'" Opp. 24 (quoting Pet. 13).

Respondents suggest that, because in their view the claims in *Hawkins* would satisfy *Grable*'s test for jurisdiction under § 1331—a determination the Fifth Circuit notably did not make—it is "not clear that the Fifth Circuit's failure to discuss 28 U.S.C. § 1331 indicates its belief that § 27 . . . would confer jurisdiction over a state law claim (unlike the one in *Hawkins*) that failed to satisfy the 'arising under' test of 28 U.S.C. § 1331." Opp. 25. But respondents' speculation is not supported by *Hawkins*. Under *Hawkins*, if a state-law claim "seek[s] to enforce liabilities or duties created by federal securities laws"—i.e., if it is within the plain terms of § 27—then there is federal jurisdiction, without any consideration of § 1331. 149 F.3d at 332 ("[A]ll of Hawkins's claims . . . , though carefully articulated in terms of state law, are actions at law seeking to enforce liabilities or duties created by federal securities laws which are

governed exclusively by federal courts pursuant to 15 U.S.C. § 78aa."). Nothing in *Hawkins* limits § 27's jurisdictional reach to claims "arising under" federal law within the meaning of § 1331.

Like the Fifth Circuit, the Ninth Circuit has held that § 27 provides jurisdiction over state-law claims alleging a federal securities-law violation or seeking to enforce a federal securities-law duty. *See, e.g.*, *Sparta Surgical Corp. v. Nat'l Ass'n of Secs. Dealers, Inc.*, 159 F.3d 1209, 1211 (9th Cir. 1998) ("Because Sparta's complaint sought relief based upon violation of exchange rules, subject matter jurisdiction was specifically vested in the federal district court under the Exchange Act."). Respondents nonetheless suggest that the "Ninth Circuit's position" on the question presented "is murky and rapidly evolving," citing a trio of post-*Sparta* decisions. Opp. 25 & n.15 (citing *Sacks v. Dietrich*, 663 F.3d 1065 (9th Cir. 2011); *Cal. ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831 (9th Cir. 2004); *Lippitt v. Raymond James Fin. Servs.*, 340 F.3d 1033 (9th Cir. 2003)). But those cases all apply the rule announced in *Sparta*. In *Sacks*, the court held that § 27 "conferred exclusive jurisdiction on the district court because the central question of th[e] case [wa]s whether FINRA rules were violated." 663 F.3d at 1069. In *Lockyer*, the court applied *Sparta* to the parallel exclusive-jurisdiction provision found in § 317 of the Federal Power Act (the "FPA") and held that § 317, like § 27, confers federal jurisdiction on claims within its terms. *See* 375 F.3d at 839-43; *see also* Pet. 18. And while in *Lippitt* the court held that there was no jurisdiction over the plaintiff's claims under § 27, the

court explained that "if [the plaintiff] were asserting a violation of an SRO rule, then . . . this would be a matter of exclusive federal jurisdiction, and therefore removal would be proper." 340 F.3d at 1042; *see* Pet. 16. Simply put, the Ninth Circuit has not deviated from *Sparta*. There is no other "line of Ninth Circuit" cases (Opp. 26) suggesting a different rule.

The circuit conflict here is reflected in (and confirmed by) district court decisions divided on the same § 27 jurisdictional issue. *See* Pet. 16, 17. And it extends to circuit decisions interpreting the parallel exclusive-jurisdiction provisions in the Natural Gas Act (the "NGA") and the FPA. *Id.* at 17-19. Review by this Court to resolve this disarray is urgently needed.

C. The Third Circuit's Decision Is Wrong

Respondents' merits arguments only demonstrate their weakness. They do not justify permitting an acknowledged circuit conflict on an important and recurring question of federal securities law and federal jurisdiction to persist.

1. Respondents have no answer to the obvious point that the words "shall have exclusive jurisdiction" cannot create *less* jurisdiction than the words "shall have jurisdiction." Pet. 21-22. Respondents instead parrot the Second Circuit's theory in *Barbara v. New York Stock Exchange, Inc.*, 99 F.3d 49 (2d Cir. 1996), that to the extent § 27 provides jurisdiction, it does so only for federal claims for which there would already be jurisdiction under § 1331. *See* Opp.

16-17 & n.7; *see also Barbara*, 99 F.3d at 55.[2] Neither respondents nor the Second Circuit, however, even attempt to reconcile this conclusion with the obvious differences in the language of the two statutes. *See* Pet. 21-23.

Respondents contend that in *Pan American Petroleum Corp. v. Superior Court of Delaware for New Castle County*, 366 U.S. 656 (1961), this Court held that the differences between the language of § 1331 and that of § 27 are meaningless. *See* Opp. 17-18. As petitioners have explained, *Pan American* is a straight-forward application of the "well-pleaded complaint" rule that issues raised only by way of defense do not create jurisdiction, which has nothing to do with jurisdiction here, where federal law is invoked on the face of the complaint. *See* Pet. 24-25. Respondents ignore that point entirely and instead focus on a single sentence in a footnote, which noted in passing that even though the NGA's exclusive-jurisdiction provision, § 22, does not contain the words "arising under," § 22 still did not supply federal jurisdiction over cases raising NGA issues only by way of a defense, because a limitation to claims "arising under" the NGA was implicit. 366 U.S. at 665 n.2; *see* Opp. 17-18. That observation goes back

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[2] Under the Second Circuit's view, § 27 is not coextensive with § 1331, but actually *narrower*, because § 1331 reaches "state-law claim[s] [that] necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities," *Grable*, 545 U.S. at 314, while the Second Circuit believes § 27 does not apply to "claims created by state law" at all, *Barbara*, 99 F.3d at 55.

to the well-pleaded complaint rule, which again is irrelevant here.

Even if this Court otherwise believed at the time it decided *Pan American* that NGA § 22 was coextensive with § 1331, that conclusion no longer holds. When *Pan American* was decided, "arising under" jurisdiction was defined broadly to include *any* claim requiring "construction or application" of federal law, so long as the federal claim was "not merely colorable." *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 199 (1921). That standard encompasses every claim falling within § 22 of the NGA (and § 27 of the Exchange Act). Since *Pan American*, however, § 1331's "arising under" jurisdiction has been scaled back significantly. *See Grable*, 545 U.S. at 314 (requiring "substantial," disputed federal issue); *id.* at 312-13 (explaining that *Smith*'s "generous statement of the scope" of federal-question jurisdiction "has been subject to some trimming"). But § 27 has not been comparably restricted, and there is no basis in its text or history for doing so. At the very least, evolution of the law since *Pan American* was decided leaves its application here subject to serious doubt, further confirming the need for this Court's review.

The footnote dictum in *Pan American*, moreover, was based not on § 22's text, but on its legislative history, which specified that the provision governed "cases *arising under* the act." 366 U.S. at 665 n.2 (emphasis added) (quoting S. Rep. No. 1162, at 7 (1937)); *see* H.R. Rep. No. 709, at 9 (1937) (same). There is no analogous legislative history for § 27. *See Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 383 (1996).

2. Unable to establish a serious textual basis for their position, respondents try to insist that the purpose of § 27 undermines federal jurisdiction. *See* Opp. 20. But this Court has already held that "Congress intended § 27 to serve at least the general purposes underlying most grants of exclusive jurisdiction: to achieve greater uniformity of construction and more effective and expert application of" the Exchange Act and the rules and regulations promulgated thereunder. *Matsushita*, 516 U.S. at 383 (internal quotation omitted).[3]

Accordingly, it is irrelevant that state courts in other contexts sometimes "adjudicate[] complex questions of federal securities law." Opp. 18. What matters is that, as this Court has recognized, Congress did not believe that state courts could provide uniform, effective, and expert application of the Act when adjudicating claims asserting violations of or duties under the Act. The other contexts cited by respondents only underscore the point. For example, state courts are permitted to resolve Exchange Act *defenses* (Opp. 19) only because of the well-pleaded complaint rule, *see Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987), which has no bearing here, *see supra* at 8. And state courts of course sometimes approve settlements releasing Exchange Act claims (Opp. 20), but they need not interpret federal securities law to do so. *See Matsushita*, 516 U.S. at 383. Respondents can cite no case allowing a state court

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[3] This Court's conclusion about § 27's purpose is rather more compelling than the commentary cited by respondents. *See* Opp. 20-21.

to adjudicate claims asserting violations of SEC trading rules.

3. Respondents distinguish this Court's decisions in *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979), and *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964), all of which described § 27 in jurisdiction-creating terms irreconcilable with the Third Circuit's view that § 27 does not "grant" jurisdiction, but merely eliminates concurrent state-court jurisdiction. *See* Pet. 19-20. Respondents do not and cannot deny the statements in these opinions, but argue only that the decisions themselves did not conclusively resolve the question presented here. *See* Opp. 21-23. But this Court's statements regarding § 27 highlight the need for the Court to resolve the circuit conflict.

D. The Case Presents An Issue Of National Importance

Finally, respondents assert that review is unwarranted because the question presented is unimportant. *See* Opp. 26-27. That contention is belied by the involvement of the Securities Industry and Financial Markets Association as *amicus* in this case, both in this Court and below.

Respondents insist there is no danger of forum-shopping, because any state-law claims that "meaningfully turn on a federal ingredient" are subject to § 1331 jurisdiction. Opp. 26-27. Of course, the standard for establishing jurisdiction under § 1331 is more demanding than whether a claim "meaningfully turn[s] on a federal ingredient." *See Grable*, 545

U.S. at 314 ("[T]he question is, does a state-law claim necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities."). And this case itself proves respondents wrong. Even if § 1331 provides federal jurisdiction over some state-law claims also covered by § 27, the latter provision provides federal jurisdiction over some claims where § 1331 does not. The Third Circuit's decision simply invites plaintiffs to avoid federal jurisdiction through creative pleading.

SIFMA's involvement shows that this is a problem worth addressing. And respondents do not dispute that because there is ordinarily no appellate review of a remand order based on a lack of jurisdiction, this case provides a rare opportunity for the Court to intervene. *See* Pet. 27.

CONCLUSION

The petition for a writ of certiorari should be granted.

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